IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE JURISDICTION

CRIMINAL APPEAL NO.540 OF 2003

Himayu Mohamed Hanif Dolare Adult, residing at 8/10, Bandar Road, In front of Jumma Masjid, Kalyan, Dist. Thane .. Appellant (Org.Accd.No.1)

Vs.

The State of Maharashtra .. Respondent

Mr. A.P. Mundargi with Mr. S.V. Marwadi with Mr. Ganesh Gole for Appellant.
Ms. P.H. Kantharia, APP for State.

CORAM: S.S. PARKAR & ANOOP V. MOHTA,JJ.

Date : September 22, 2005.

ORAL JUDGMENT (PER S.S. PARKAR,J.):

1. This appeal is filed challenging the Judgment and Order dated 1/4/2003 delivered by the Additional District & Sessions Judge, Kalyan convicting the appellant for offence under Section 302 of IPC and sentencing him to imprisonment for life and to pay fine of Rs.1000/- in Sessions Case No.227 of 1996.

2. The prosecution case briefly stated is as follows:-

. The incident in question had taken place on 15/8/1989 at about 9 p.m. near the house of the deceased and the accused. The deceased and the accused persons are related. Originally there were three accused persons arraigned in the trial. The present appellant and original accused no.2 are the sons of original accused no.3. The appellant and the deceased were cousins. They were residing in the same building. While the accused were residing on the ground floor, the deceased was residing with his father's family on the first floor in the same building. The incident of assault had taken place on a very small pretext. The quarrel had taken place between the deceased and the accused persons on the ground that the deceased had acknowledged the letter addressed to accused no.3. The same was acknowledged by him and handed over to the accused no.3 at the instance of wife of accused no.3. But accused no.3 did not like it. Three days before the incident some mud had sprinkled on the body of accused no.3 when the deceased Shadab was driving his scooter which also angered the accused persons. On the date of the incident at about 5 p.m. accused nos.1 and 2 had

given kicks and fists blows to deceased Shadab. Shadab's mother came to his rescue and thereafter accused nos.1 and 2 had gone to the house of the deceased with weapons in their hands but the mother of the deceased did not open the door. Thereafter when deceased went out at about 9 p.m. for attending his duty as a Clerk at Retibander, accused no.1, the appellant who was hiding behind a truck along with accused no.2, assaulted him with a knife on his neck. P.W.2 Asgar Gulam Gaus, who was present there and saw the assault, rushed to his help. Accused ran away. Shadab was removed to nearby Phadke Hospital by the people who had gathered there. However, looking to the seriousness of the injuries, doctor in the Phadke Hospital advised to take the patient to Civil Hospital and, therefore, he was removed to Rukminibai Hospital at Kalyan, where he was declared dead and complaint was lodged by the father of the deceased and the crime was registered for offence under Sections 302, 109 read with Section 34 of of IPC against three accused i.e. father and two sons, including the appellant. The Investigating Officer drew spot panchanama under which the blood found on the place of the incident was attached along with the blood stained earth. Inquest

Panchanama was drawn on the dead body and body was sent for post mortem examination. The police took search of the houses of the accused and seized blood stained clothes of accused nos.1 and 2 under seizure panchanama. The clothes of the deceased were also seized under panchanama. The statements of the witnesses were recorded, including three eye witnesses. Police had seized knife from the possession of appellant-accused no.1. Deceased's clothes and the knife were sent to the C.A. for examination. After the completion of the investigation, charge-sheet was filed in the court of JMFC, Kalyan and the case was committed to the Sessions Court.

3. Before the Sessions Court charge was framed for offence under Section 302 read with Section 34 of IPC against accused nos.1 and 2. So far as accused no.3 is concerned, the charge was framed against him for offence of abetment under Sections 109 and 302 of IPC. As the accused pleaded not guilty to the charges, on behalf of the prosecution 10 witnesses were examined. P.W.1 is Majaz Pangari who was examined as an eye witness but had turned hostile and

did not support the prosecution at all. Similarly P.W. 3 Mufizuddin Shaikh who was examined as an eye witness also turned hostile. P.W. 2 is Asgar Gaus who was examined as an eye witness and has supported the prosecution case. P.W.4 is Vazira Begum Abdul Rashid Dolare, the mother of the deceased who has deposed about the motive and the previous incident of assault and threat held out by accused nos.1 and 2. P.W.5 is Khaja Shaikh, a panch to the seizure, who had also turned hostile. P.W.6 is Suresh Jambhale who also acted as a panch had turned hostile. P.W. 7 is Dr. Asha Raibole, who had performed post mortem examination on the dead body. P.W. 8 is Dr. Suresh Phadke, who had attended the patient when the latter was taken to his hospital. P.W. 9 is Nathu Baviskar, Assistant Sub Inspector, who had attached the clothes of the deceased and lastly, P.W. 10 is Hindurao Jagdale, the Constable who had proved the signature of the I.O. on the FIR Exh.58. The prosecution has also produced on record the panchanamas and the C.A. reports. The defence of the accused was of total denial.

4. After considering the entire evidence on

record, the learned Additional District and Sessions Judge, Kalyan by his impugned Judgment and Order acquitted accused nos.2 and 3 but convicted the appellant-original accused no.1 for the offence under Section 302 of IPC and sentenced him to life imprisonment and to pay a fine of Rs.1000/-. The said order of conviction and sentence recorded against the appellant is under challenge in this appeal.

5. We heard both the sides at length and also perused the evidence led by the prosecution as well as the reasoning of the trial court. On behalf of the appellant, the learned defence counsel raised two contentions before us. Firstly, he contended that there is uncorroborated testimony of single eye witness whose presence at the place of the incident itself is in doubt and, therefore, the appellant is entitled for acquittal. Secondly, it is contended that even if the evidence of eye witness P.W.2 Asgar Gaus is relied on, the offence that can be said to have been proved by the prosecution is culpable homicide not amounting to murder and, therefore, the appellant is liable to be convicted under Section 304 Part II of IPC for want of requisite intention to

murder the deceased.

6. As far as the first contention is concerned, it is argued by the defence counsel that P.W.2 Asgar Gaus, though claimed to be present at the place of offence and witnessed the assault on the deceased and gone to rescue deceased Shadab, he has not produced his blood stained clothes. It is also argued that his conduct in not helping the deceased to take him to the hospital also is incredible and does not inspire confidence that he was present at the time of the incident. It is also argued that this witness does not state that he had told anybody about having seen the incident in question, not even to the members of the family of the deceased though he had attended the funeral ceremony and his statement was recorded on the next day evening.

7. So far as the criticism on the evidence of eye witness Asgar Gaus P.W.2 is concerned, it has to be considered and appreciated in the context of the facts and circumstances of the case. We cannot forget that there were three eye witnesses to the incident and the

complaint was lodged immediately after the incident same night by none other than the father of the deceased Shadab. It is not in dispute that the names of the appellant, his brother and father i.e. accused no.3 were mentioned in the FIR itself which was lodged immediately without loss of time. Out of the three eye witnesses, two eye witnesses have turned hostile, but this eye witness i.e. P.W.2 Asgar Gaus has not only supported the prosecution but has stood the test of cross examination. The immediate concern of the family was to take the deceased to the hospital but he was declared dead in the hospital and thereafter the police had to draw the inquest panchanama and send body for post mortem examination. They had also recorded the statement of the father which was treated as FIR on the basis of which crime was registered. Next day morning the police had to draw spot panchanama. The statements of other eye witnesses had been recorded. Since the names of the accused were already disclosed in the FIR lodged by the father of the deceased and the other formalities had to be performed by the police, the recording of the statement of P.W.2 Asgar Gaus on the following evening cannot be considered to be late recording of the

statement. Moreover, one cannot be oblivious to the fact that when the names of the accused were disclosed in the FIR lodged immediately and the statements of other eye witnesses were recorded, police had no necessity to unnecessarily and falsely record the statement of P.W.2 Asgar Gaus as an eye witness. No doubt his conduct in leaving the injured after giving him initial support at the first blush appears to be a little unbelievable. But he has explained in his deposition that after taking the deceased 2 to 4 steps he experienced giddiness and, therefore, he stopped and left the injured Shadab advising him to go to the hospital for treatment. Shadab had received injury on the right side of his neck which he was pressing with his hand and was in a position to walk also. Therefore, the witness must not have felt that Shadab was unable to move further without the help and support of this witness. In any event the witness having felt giddiness about which no omission has been pointed out, the conduct of this witness appears to be absolutely natural and his being an eye witness to the incident cannot be disbelieved. He immediately went to the nearby Mosque and washed the stains of blood which were on his hands and the clothes and since his

statement was recorded next day evening, that is within less than 24 hours, there was no occasion for him to keep those clothes in blood stained condition and produce them before the police in support of his statement that he was present at the time of the incident and had helped the deceased initially to walk. From the lengthy cross-examination of this witness no omissions or contradictions have been brought on record. He has stated that he was on friendly terms with deceased Shadab's brother by name Simab. But that cannot be considered to be reason for him to falsely support the prosecution case. In fact that is the reason why he did not deviate from his previous statement and turned hostile to the prosecution case as was done by other two eye witnesses examined on behalf of the prosecution.

8. The evidence of this eye witness has been supported and corroborated by the medical evidence. P.W.8 Dr. Phadke had examined the injured in the Phadke Hospital at Kalyan. He was attached to the hospital as an anastheist. The hospital was closed on that day owing to the fact that it was Independence Day being 15th August. Therefore, 2-3 persons went to

his house and called him to the hospital. The patient was kept in the operation theatre by the Nurses. He has deposed that before he started treating the patient, the patient expired. According to him the patient had sustained a grievous deep injury caused by sharp and cutting object on the right side of his neck. According to him all the major vessels were cut and, therefore, there was profused bleeding. He, therefore, sent report to the police. He has also stated that such patient like the deceased Shadab with the injury on his neck could walk few steps after receiving such injury. Thus, the evidence of this eye witness Asgar Gaus has been supported in two ways that the deceased was assaulted with the knife on his neck and that he walked along with him 2-4 steps. P.W.2 Asgar Gaus has deposed that he had seen accused no.1 i.e. the appellant and his brother standing near the truck. Shadab shouted on receiving the blow. He rushed towards him and accused no.1 ran away. Shadab sustained bleeding injury on his neck.

9. The other doctor is P.W. 7 Dr. Asha Raibole who had performed post mortem on the dead body. According to this doctor following injuries were

noticed on the person of the deceased Shadab:-

1. Stab wound on right side of the neck, 1" below right ear. It was a single wound, size - 1 1/2" x 1/2" x 2" edges were pointed, boarders clear and sharp, wound was gapping. This wound was communicating with traches. Right carotid artery and the accompanying vein both were injured i.e. (cut totally).

2. Abrasion on right elbow, 1 cm x 1 cm.

bleeding from the wound was present.

. According to this doctor the injuries were caused by hard, pointed and sharp weapon having both the edges sharp. The cause of death according to her was haemorrhagic shock following stab injury to right carotid artery. On being questioned, this doctor has replied that it is unlikely that such person would walk but it is not impossible.

9. Thus, the evidence of the eye witness who cannot be said to be a chance witness or unnatural

witness has been corroborated by the medical evidence. Unfortunately in this case the father of the deceased who had lodged the FIR had expired before the trial commenced and, therefore, his evidence could not be recorded. It is, therefore, contended on behalf of the defence that there was no complainant to corroborate the testimony of the eye witnesses but the FIR can be used for the purpose of corroborating or contradicting the testimony of the complainant. Other unfortunate aspect of this case is that even the I.O. had died before the trial began in this case and, therefore, he could not prove the panchanamas drawn by him, including the spot panchanama, the seizure panchanama of the knife though his signatures on those panchanamas have been proved by constable Hindurao Jagdale P.W. 10. So far as the recovery of knife from the possession of accused no.1 is concerned, the same can be of no assistance to the prosecution as the C.A. report shows there was no blood found on it, though panchanama states otherwise. All the panchas had also unfortunately turned hostile in this case just as two eye witnesses. But in our view the evidence of eye witness which is reliable does prove the assault made by the appellant on the deceased

Shadab. The blood stained clothes of the accused were also seized and as per the C.A. report they were stained with human blood. But the said evidence also cannot be relied on as neither of the panchas has supported the seizure of clothes and the I.O., who had drawn panchanama, had died before the trial had commenced and, therefore, he also could not be examined. The trial court has referred to the judgment of the Supreme Court holding that if the evidence of sole eye witness is found to be cogent and trustworthy and if it is corroborated by the medical evidence, conviction based on such evidence is proper.

10. Apart from this there is evidence of mother of the deceased by name Vazira Dolare, who is examined as P.W.4. She has deposed about the motive. According to her on the date of the incident at about 5 p.m. appellant and his brother accused no.2 had quarrelled with her deceased son Shadab in her courtyard. She intervened and supported her son. According to her that time accused nos.1 and 2 i.e. this appellant and his brother threatened to kill Shadab. She has further deposed that within half an hour thereafter appellant and his brother Razi again came with knife

to their house but she closed the door of her house when Shadab was inside the house and, therefore, appellant and his brother went back. According to her at about 8 p.m. her son left the house stating that he would offer the prayers in the Mosque and then go to his place of work. Accordingly, Shadab went to the Mosque for offering prayer and within short time thereafter she heard that her son was killed. Thus, the evidence of mother of the deceased also supports the prosecution case by bringing on record the circumstance of motive against the appellant.

11. In view of the aforesaid evidence we are in no doubt that the prosecution has proved that appellant had assaulted the deceased with knife as a result of which he sustained bleeding injury on the neck and consequently died. The question is what offence can be stated to have been committed by the appellant. According to the defence counsel since there was a quarrel and only one assault was made, though with a knife, it cannot be said that the appellant had intention to kill the deceased. It is further argued that if the appellant who was in the company of his own brother, accused no.2, could not have left the

deceased by giving one blow on him if he had wanted to kill the deceased but would have given more blows on the person of the deceased.

12. From the place of injury caused on the right side of the neck of the deceased, it appears that the appellant must have assaulted him from behind. As per the evidence of eye witness Asgar Gaus, the appellant and his brother were hiding behind a standing truck and when they saw deceased passing, he was assaulted. From the place of assault on the right side of the neck, it appears that the appellant must have assaulted the deceased from behind. If he had been assaulted from the front side, the injury would have been on the left side of the neck of the deceased. The witness Asgar Gaus was coming from the front side of deceased Shadab when the latter was assaulted by accused persons. After giving one blow the accused ran away. Though the assault was made on the vital part of the body i.e. the neck but since the assault was not on the front side of the neck but on the right side of the neck we cannot say with any amount of certainty that the accused had intention to kill the deceased. Secondly, it cannot be said with any amount

of certainty that the accused had intended to cause such bodily injury which he knew to be likely to cause death of the person to whom the harm was caused. Because of the quarrel and the only injury caused on the right side of the neck we are of the view that the offence committed by the appellant is culpable homicide not amounting to murder and, therefore, would be punishable under Section 304 Part II of IPC. Under Part II of Section 304 the maximum punishment which can be levied is 10 years imprisonment. Under Part I of Section 304, if the act was done with an intention of causing death, in that case also an alternate sentence provided is imprisonment of either description for a term which may extend to ten years and fine.

13. On behalf of the appellant a fervent plea has been made that the appellant had no previous criminal antecedents and since after his imprisonment his wife has been suffering from acute depressive psychosis and, therefore, the appellant may be released on sentence of imprisonment already undergone by him which is about less than 3 years, by even imposing substantial sentence of fine. On the other hand it

has come on record that few days before the murder of deceased Shadab his brother had died in an accident as deposed to by his mother P.W.4 Vazira Dolare. In such circumstances, the mother of the deceased who had also lost her husband i.e. the father of the deceased Shadab after this incident in question, must be in dire necessity of financial help. Though, the defence counsel initially expressed inability to pay large amount of fine, he later on submitted that the amount of fine may not be more than Rs.50.000/- and sentence of imprisonment more than 5 years. We feel that in the facts and circumstances of the case it would be just and proper to impose the sentence of 5 years imprisonment and fine of Rs.50,000/-, all of which could be paid to the mother of the deceased P.W.4 Vazira Dolare.

14. In the result, this appeal is partly allowed. The conviction of the appellant for offence under Section 302 of IPC and the sentence of life imprisonment is quashed and set aside and instead the appellant is convicted for offence under Section 304 Part II of IPC and sentenced to RI for five years and to pay a fine of Rs.50,000/- in default to undergo

further imprisonment of two years. The amount of fine shall be deposited by the appellant within a period of two months from today in the Sessions Court at Kalyan. When the said amount is deposited, the Additional Sessions Judge, Kalyan shall ensure that the whole fine amount of Rs.50,000/- is paid to P.W.4 - Vazira Begum Abdul Rashid Dolare, the mother of the deceased, who is stated to be alive by the counsel for the defence and report to this court accordingly.

(S.S. Parkar,J.)

(Anoop V. Mohta,J.)